UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

CASE NO. 25-CA-219925

Alcoa Corporation,

and

United Steel, Paper and Forestry,
Rubber, Manufacturing, Energy,
Allied Industrial and Service Workers
Local 104

BRIEF FOR RESPONDENT ALCOA CORPORATION

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Dated: March 12, 2019

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Respondent,	)
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	)
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RESPONDENT ALCOA CORPORATION'S POST-HEARING BRIEF

Respondent Alcoa Corporation ("Alcoa" or "Respondent"), by and through its attorneys and pursuant to Section 102.42 of the National Labor Relation Board's ("the Board") Rules and Regulations, submits this Post-Hearing Brief to Administrative Law Judge ("ALJ") Paul Bogas in connection with the above-captioned proceeding. The evidence presented at the hearing conducted on February 5, 2019 demonstrated that the Counsel for the General Counsel ("General Counsel") failed to establish that Respondent violated Section 8(a)(5) of the National Labor Relations Act ("the Act") by refusing to provide the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 104 ("the Union") with witness names where Alcoa had concerns of retaliation and future non-participation. Moreover, the General Counsel failed to establish Respondent violated the Act by asking employees to keep the investigation confidential given the sensitive nature of the investigation. The General Counsel similarly failed to establish Respondent violated the Act when it provided the Union with the requested interview

dates on July 2, 2018. Accordingly, the Complaint issued on behalf of the Union should be dismissed in its entirety.

I. STATEMENT OF THE CASE

The Union filed an unfair labor practice charge, Charge No. 25-CA-219925, on or about May 9, 2018 and an Amended Charge on or about August 28, 2018 (collectively "the Charge"). On September 27, 2018, the Regional Director for Region 25, Patricia Nachand, issued a Complaint alleging Respondent violated Sections 8(a)(1) and (5) of the Act by "fail[ing] and refus[ing] to furnish the Union with the information requested" and "unreasonably delay[ing] in furnishing the Union with the information requested." (GC Ex. 1(e), ¶¶ 7(c) and (d))[1]. The Complaint also alleges that Respondent violated Section 8(a)(1) of the Act by "instruct[ing] employees not to discuss investigatory interviews with other employees." (Id., ¶ 8).

The allegations set forth in the Complaint should be dismissed. The evidence presented at hearing demonstrates that while Labor Relations Specialist Terrence Carr ("Carr") asked employees to "keep in mind the conversations were confidential" and that employees should keep the conversation confidential, this was warranted in light of the history of employees not participating in investigations. (Tr. 54-55). Moreover, while Respondent refused to provide the witness names to the Union, Respondent offered the Union an accommodation –witness statements with the names redacted. The Union never responded to this offered accommodation and instead, only demanded the information, without accommodation. At the same time, an employee who informed the Union that he provided a witness statement informed Respondent of retaliation based on his participation in the investigation. As a result of this retaliation, Respondent rightfully withheld the witness names. Due to an oversight, when Carr redacted the employee names from

[1] References to the hearing transcript will be "Tr." followed by the appropriate page number. General Counsel exhibits will be referenced as "GC. Ex. __." Respondent exhibits will be referenced as "R. Ex. __."

the witness statements, the dates of the statements were also covered. Respondent provided the interview dates on July 2, 2018. The Union was in no way prejudiced by this delay.

II. ISSUES PRESENTED

1. Did Alcoa lawfully withhold employee witness names where Respondent's confidentiality concerns outweighed the Union's need for the information in light of the supplied redacted statements, as evidenced by the Union's failure to conduct any investigation, under the standard set forth in *Detroit Edison v. NLRB*, 440 U.S. 301 (1979)?

2. Did Alcoa unreasonably delay in providing the interview dates to the Union where the Union was in no way prejudiced by the delay?

3. Did Alcoa violate the Act by telling employees to keep in mind that investigations were confidential and they should "keep the conversations confidential"?

III. STATEMENT OF FACTS

The facts in this case are not largely in dispute. In late March 2018, Alcoa began investigating allegations that bargaining unit employee Ron Williams ("Williams") used racial slurs toward a contract truck driver. (GC Ex. 3; Underhill Tr. 14). As part of its investigation, Carr interviewed six bargaining unit employees. (GC Ex. 13, 14). During these interviews, Carr said to employees to "keep in mind the conversations were confidential" and that employees should keep the conversation confidential**.** (Tr. 54-55). Carr did not threaten employees with any repercussions if they broke confidentiality. Carr gave this instruction to employees based on a history at the plant of employees' non-participation in investigations and believed if he did not provide assurances regarding confidentiality employees may not speak candidly. (Carr Tr. 56). Based on these assurances from Carr, all of these employees confirmed that Williams used racial slurs or otherwise acted inappropriately in the workplace and four of the six employees gave

statements (either immediately following the interview or in the days following). (GC Ex. 10). None of the employees requested Union representation during the interviews, though it was offered. (Carr Tr. 69). After completing its investigation, Williams was suspended pending termination and then was terminated. (GC Ex. 3, 7; Underhill Tr. 21). The Union grieved this action. (GC Ex. 8).

On April 16, 2018, the Union requested, among other items:

> Information pertaining to the interviews of the one Dayshift Hourly employee and the five afternoon shift hourly employees that were provided by the Company per the information request by Bruce Price on or about April 7, 2018. Information should include [n]ame that coincides with each interview, the date the interview took place, the location were [sic] the interview took place and a list of who was present when the interviews took place.

(GC Ex. 9).[2] Carr responded that "[b]ased on confidentiality request of employee's [sic] names will not be shared at this time." (GC Ex. 10). In an effort to accommodate the Union's request but protect employees from potential retaliation, Carr provided the four written statements he received from bargaining unit employees with the names redacted. (Id.). As Carr testified, historically hourly employees at the Warrick facility did not write statements so Alcoa believed it would be best to redact the names to encourage future participation in investigations. (Carr Tr. 56).

In response, on April 26, 2018, the Union ignored Respondent's offered accommodation and instead, insisted on the unredacted statements because the Union "has a legal right to the information," without further explanation. (GC Ex. 11). As Union Business Agent Tim Underhill

[2] Underhill alleged the information was needed to "follow up and investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts." (Underhill Tr. 24-25). Despite this claimed desire, Underhill admitted that the Union never interviewed the one employee who disclosed he was a witness and provided a statement to Carr and did not conduct its own investigation. (Underhill Tr. 41).

("Underhill") admitted, the Union did not offer a confidentiality agreement or otherwise attempt to address the employee confidentiality concerns. (Underhill Tr. 40). It merely demanded the information. This same day, Pack Ship Crew Leader Wade Shanks ("Shanks") emailed Carr about concerns bargaining unit employee John Taborn ("Taborn") raised about negative and retaliatory treatment he received.[3] (R. Ex. 1). According to Shanks, Taborn reported that someone (who Taborn believed to be Union officials) put garbage and salt in his boots. (Id.). Shanks reported that Shanks believed Taborn was being retaliated against because Taborn cooperated in Alcoa's in investigation of Williams, a fellow bargaining unit member, and confirmed Williams' use of racial remarks. Shanks also reported that he had heard there was animosity directed at Taborn based on his participation in the investigation into Williams. (Id.).

In light of Shanks' report, Carr continued to deny the Union's request for witness names. On April 30, 2018, Carr responded to the Union's April 26, 2018 request. (Underhill Tr. 34). Carr noted that Respondent's need to maintain confidentiality outweighs the Union's right to the information. (GC Ex. 12). Carr emphasized that employees were given assurances of confidentiality and there was "a significant risk that intimidation or harassment of witnesses will occur ***as demonstrated by a recent incident of misconduct reported to management.***" (Emphasis added)(Id.). Carr also noted that the Company accommodated the Union's request by providing the redacted statements. (Id.). The Union did not respond to this claim. Instead, on May 1, 2018,

[3] The General Counsel asserts Shanks' email should be ignored because it is hearsay; however, the email is not being used to establish that Taborn was in fact being retaliated against, rather, to establish Respondent's state of mind in responding to the Union's requests. Where not being used to establish the truth of the matter asserted, the email is not hearsay. (Fed. R. Evid. 801). The General Counsel then implies the ALJ should reject the email because Shanks may have just fabricated the entire report or misstated what was reported to him. This claim should similarly be rejected. As Carr testified, he considered the email when considering whether to break employee confidentiality. (Carr Tr. 57-58). Shanks had no reason to lie and make false accusations. Instead, he merely sought to report employee concerns to Carr and provide his own opinion about potential future retaliation. (R. Ex. 1). Moreover, Taborn later sent Carr an email directly, advising him of additional negative treatment by the Union based on Taborn's participation in Alcoa's investigation. (R. Ex. 2). It defies logic that Shanks fabricated Taborn's initial report and then was able to convince Taborn to participate in his ongoing ruse.

the Union made another request for information, requesting new documents as well as a follow up request to a "partial response" related to witness statements, requesting what it believed were two withheld statements. (GC Ex. 13). The Union did not further request the witness names or the dates of the interview. Alcoa did clarify that there were no additional statements. (GC Ex. 14). Following this response, on May 18, 2018, Carr received an email from Taborn directly, informing Carr that Taborn had been removed from his union position because the Union alleged Taborn "was creating a violent environment," apparently by giving evidence against his union brother during Alcoa's investigation. (R. Ex. 2). Taborn told the Union that he had provided a statement to Alcoa regarding Williams and in response, the Union removed Taborn from his position as steward. (Id.). This further validated Carr's belief that retaliation would – and did – occur if witness names were revealed.

What Carr did not realize, is that in redacting the witness names from their statements, the dates of the statements were also covered. As a result, the dates of the statements were not provided to the Union until July 2, 2018. (Carr Tr. 63-64). "[I]t was simply an oversight." (Carr Tr. 63). Once Carr noticed his error, he, "unsolicited," sent the dates to the Union in an effort to correct the oversight. (Underhill Tr. 39). There was no evidence presented that the Union was prejudiced in any way by the slight delay in providing this information.

The arbitration over Williams' grievance was held on January 24, 2018. (Underhill Tr. 41). The witness names were not disclosed at the hearing and the record in the hearing closed. (Underhill Tr. 45).

IV. LEGAL ARGUMENT

A. Alcoa's Need to Protect the Witnesses By Withholding their Names Outweighed the Union's Need for the Information, Especially Where the Union Did Not Conduct Its Own Investigation

Under existing Board law, Alcoa properly refused to provide the witness names where it had a legitimate and substantial need in maintaining confidentiality. As such, the ALJ must weigh Alcoa's confidentiality concerns against the Union's need for the information. *Detroit Edison v. NLRB*, 440 U.S. 301 (1979); *Northern Indiana Public Service Company (NIPSCO)*, 347 NLRB 210 (2006). Because Respondent's confidentiality concerns outweigh the Union's need for information, the witness names were properly withheld. *Piedmont Gardens*, 362 NLRB No. 139 (2015).

1. Alcoa's Need to Protect the Witnesses Outweighed Union's Need

As Carr testified, Alcoa had a need to maintain confidentiality based on a history of employees not participating in investigations or writing statements against other bargaining unit employees out of fear of retaliation or harassment. (Carr Tr. 56). Alcoa had a need to encourage employees to participate in investigations then and in the future, especially where the topic of the investigation involved the use of racial slurs. Further, each of the witnesses was given an assurance of confidentiality prior to providing a statement. This was part of Alcoa's effort to encourage employee candor and an assurance Alcoa did not take lightly. The Union's need for the information did not outweigh Alcoa's need. In fact, while Underhill testified that the Union needed the information to "follow up and investigate whether or not the interviews and the actual process was done, and also to allow us to do an internal investigation and to check up on the facts," (Underhill Tr. 24-25), he also admitted that the Union did not conduct any independent investigation, even with the witness names it was provided. (Underhill Tr. 41). While the Union

stated it had a need for the information, its own actions refute the claim where the Union received the names of non-Union witnesses and one bargaining unit witness self-disclosed and the Union did nothing. Merely stating some generalized need for the information, but having no intention to actually use it, underscores that the Union did not have any overwhelming need for the information.

Moreover, the Board has recognized the type of information that gives rise to a "legitimate and substantial confidentiality interest," including "that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses." *NIPSCO*, 347 NLRB at 211, *citing Detroit Newspaper Agency,* 317 NLRB 1071, 1073 (2004). This is the exact scenario of which Alcoa was concerned. As Carr noted, employees typically do not participate in investigations, likely for fear of retaliation by the Union and/or their coworkers. If the first time employees participated in an investigation and provided statements Alcoa turned the information over to the Union and employees faced harassment or retaliation, which indeed occurred, it is doubtful employees would ever participate in an investigation again. Respondent has an obligation to ensure a workplace free of the use of racial slurs and harassment. After learning of a credible allegation against Williams, Respondent relied on employees' participation in its investigation to confirm the misconduct. If employees do not participate in Respondent's investigations, it would be unable to eliminate unacceptable behavior and meet its obligations to employees to maintain a harassment free workplace.

2. Respondent Offered the Union an Accommodation and the Union Failed to Respond

Nonetheless, Respondent realized that it could not merely deny the Union all information related to witness statements and instead, attempted to accommodate the Union's request. *See e.g. Borgess Medical Center*, 342 NLRB 1105, 1106 (2004). As the evidence establishes, the Union

requested "[i]nformation pertaining to the interviews" of certain bargaining unit employees, including the names of those who were interviewed. The Union did not explicitly request witness statements but nonetheless, Alcoa offered the Union the witness statements with the names redacted. Alcoa did not completely deny the Union's request. Instead, the Union received the witness statements, detailing what each of the witnesses observed, which would allow the Union to conduct its own investigation into the allegations. The Union did nothing. Since the Union made no attempt to investigate the allegations against Williams on its own, one must assume the only reason the Union wanted the witness names was so it could intimidate them or attempt to get the witnesses to change their statements. The Union otherwise had the information necessary to conduct its own investigation and defend against the allegations to the best of its abilities.

After Alcoa offered the accommodation, the Union responded only to demand the witness names. The Union did not attempt to negotiate an alternative or in any way recognize Respondent's concerns. At the same time the Union renewed its demand for witness names, a witness and bargaining unit employee Taborn, reported that he was being retaliated against by his fellow workers because of his participation in Alcoa's investigation. Taborn reported that employees were putting salt and garbage in his boots and this only started after he voluntarily told the Union that he provided a statement against Williams. (R. Ex. 1). The very retaliation Alcoa feared would occur if witness names were disclosed was realized. In light of Taborn's mistreatment, Alcoa was not willing to subject additional employees to the scrutiny and repercussions experienced by Taborn. Carr informed the Union that "there is a significant risk that intimidation or harassment of witnesses will occur as demonstrated by a recent incident of misconduct." (GC Ex. 12). Carr also pointed out that Alcoa had accommodated the Union's

request by providing the redacted statements. (Id.). Following Alcoa's second denial of the witness names, the Union did not make any further requests for the information.

Respondent acted properly in withholding the witness names in this case. When the Union made its initial request, Respondent had concerns of intimidation given the history of the plant and sensitive nature of the investigation. Instead of merely denying the Union's request, Carr provided the witness statements with the witness names redacted. In so doing, Carr noted Alcoa's confidentiality concerns. Rather than addressing these concerns, the Union demanded the information. In the meantime, bargaining unit employees were retaliating against the only bargaining unit employee who admitted to being a witness. This did nothing to assure Alcoa that its confidentiality concerns were unfounded. On the contrary, Respondent's fears were confirmed. The Union did not offer any alternative accommodation or attempt to reach any agreement with Alcoa. Respondent met its obligations under the Act. This allegation must be dismissed.

B. Any Delay in Providing Interview Dates Was Not Unlawful Where the Union Suffered No Prejudice

While admittedly Respondent did not provide the interview dates until July 2, 2018, the Union suffered no prejudice as a result. The Union would have known the general timeframe during which the interviews were conducted based on the general timing of the discipline and failed to establish any relevance of the interview dates (other than to attempt to figure out which employees provided statements). Notwithstanding, Alcoa only failed to provide the information sooner as the result of mere oversight. Carr was attempting to provide all of the information requested by the Union over its multiple requests and failed to realize that the dates of the statements were covered when he redacted the witness names. Carr admitted it was "simply an oversight." (Carr Tr. 63). The Union ultimately received the information.

Board precedent is very case-by-case and fact-driven as to what is reasonable. *Allegheny Power*, 339 NLRB 585, 587 (2003) (explaining that "[i]n determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident"); *see also, e.g., Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993) (finding the employer did not delay providing requested information in violation of the Act because the employer "was not automatically obligated to furnish the requested information forthwith, but instead was entitled to discuss confidentiality concerns regarding the information request with the Union so as to try to develop mutually agreeable protective conditions for its disclosure to the Union"). Here, Respondent did not seek to interfere with the Union's investigation or otherwise negatively affect the Union. Instead, Carr was unaware that he had not provided the information in April (not realizing the dates had been redacted from the statements) and following the Union's April 26, 2018 request, did not hear anything further until the filing of the charge in this matter. Once Carr was alerted that he had not previously provided the information, he did so.

Moreover, despite the minor delay in providing the interview dates, there was no prejudice to the Union as a result of this delay. The Board has upheld an employers' delay in providing information as lawful where there is "an absence of any evidence that the union was prejudiced by the delay." *Union Carbide Co.*, 275 NLRB 197, 201 (1985) (noting that the union did not present any evidence of prejudice, meaning that the employer's ten month delay did not violate its duty to provide information); *see also USPS,* 2004 WL 1671531 (NLRB Div. of Judges July 19, 2004) (holding that an employer's four month delay did not violate Section 8(a)(5) because the union was not prejudiced by the delay); *Dallas & Mavis Forwarding Co*., 291 NLRB 980 (1988) (seven month delay lawful given the circumstances).

Other than a generalized statement that the Union was "hoping to get a chance to do [its] own investigation," (Underhill Tr. 25), the Union did not provide any reason why it needed the dates of interviews or that the Union suffered any harm as a result of the delay. The Union could have conducted any investigation it so desired with or without the interview dates. While perhaps the Union was attempting to determine who participated in Respondent's investigation based on process of elimination and schedule comparison, it suffered no prejudice by the minor delay in receiving the information. In fact, as Underhill admitted, the Union did not conduct any investigation. (Underhill Tr. 41). It obviously was not prejudiced in an investigation it never attempted to conduct. As such, the marginal delay by Alcoa was in no way unlawful and the allegation must be dismissed.

C. <u>Employees Were Not Unlawfully Instructed to Not Discuss Investigatory Interviews</u>

As the parties stipulated at the hearing, during his investigatory interviews, Carr "told employees who were interviewed to keep in mind that their conversations were confidential, that employees should keep the conversations confidential, including from supervision and other employees, and if others asked about the conversations to decline to answer." (Tr. 54). Not all requests for confidentiality are unlawful. As the Board noted in *Caesar's Palace*, 336 NLRB 271, 272 (2001), an employer may prohibit employee discussion of an investigation when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights. There is no evidence Alcoa applied a blanket confidentiality policy and in fact, the Complaint does not allege any such policy exists. Instead, as Carr testified, he requested (not demanded) confidentiality in order to encourage participation in the investigation. (Carr Tr. 56).

Notably, no employees who were interviewed complained about Carr's request or otherwise felt that their need to discuss the investigation was in any way restricted. The only party

that complained about Carr's request was the Union after Carr acknowledged he made this request. Carr requested confidentiality in the instant case because he wanted to encourage continued participation in the investigation, especially in light of the sensitive nature of the allegations. The interviewed employees' right to discuss the investigation did not outweigh these concerns. In fact, none of the employees requested Union representation during the investigation (Carr Tr. 69), or asked Carr about sharing information with other employees.

Moreover, employees did not feel bound to abide by Carr's request and did not face any repercussions for "breaking" confidentiality. In his email to Carr, Taborn acknowledged he discussed his participation in the investigation with Underhill. (R. Ex. 2). As Taborn admitted, "I told [Underhill] that I had signed my statement and that I had heard Ron say racial things on the dock and in the break room." (Id.). In so doing, Taborn discussed the investigation with Underhill, divulging his participation and the information provided. Obviously, Taborn was not fearful that his disclosure was in violation of Carr's request – he admitted as much to Carr. Under these circumstances, the employees' right to discuss the investigation (which was not infringed) did not outweigh Alcoa's need to maintain some confidentiality while the investigation was still ongoing.

D. Any Remedy Should Not Require of Witness Names Where the Need No Longer Exists and Witness Retaliation Concerns Remain

Even assuming *arguendo* Alcoa unlawfully withheld the names of employee witnesses, the ALJ should not order disclosure of the information where the Union no longer needs the information. As the Board explained in *Borgess Medical Center*, 342 NLRB 1105, 1107 (2004), "[T]he issue of whether there is a violation is to be determined by the facts as they existed at the time of the union request. However, the *remedy* for that violation must take into account the facts as they exist at the time of the Board's order." (Emphasis in original). The facts as they currently exist are that the Union proceeded to arbitration without the witness names, the names were not

disclosed at hearing, and the record (and consequently the matter) is closed. (Underhill Tr. 41-42). In *The Boeing Company,* 362 NLRB No. 24, *4 (2016), the Board noted that if the employer meets its burden of establishing the requesting union has no need for the requested information, "the Board will not order the employer to produce it, despite finding the violation."

The Union has no continued need for the information – other than to perhaps harass witnesses – where the evidence establishes the Union only claimed they wanted the information to conduct an investigation into Williams' discipline in order to prepare for arbitration and the arbitration challenging his grievance has concluded. (Underhill Tr. 41).[4] There is no additional investigation that needs to occur and the Union has met its duty to fairly represent Williams, as Underhill stated as the concern. (Underhill Tr. 25). At this time, the Union has no need for the information. Nonetheless, Respondent still has concerns that if the witness names were disclosed, other employees may receive treatment similar to that reported by Taborn (to date the only witness known to the Union). As such, even if Alcoa unlawfully refused to provide the witness names, the ALJ should not order production of the information.

V. CONCLUSION

Consistent with the facts and authority cited above, the Complaint should be dismissed in its entirety.

[4] At the hearing, Counsel for the General Counsel insinuated that the ALJ should mandate disclosure of the information because otherwise, Alcoa may withhold all information in the future and take on challenges via unfair labor practice charges. This is nonsensical and has no basis in fact. Alcoa and the Union have a long-established relationship and there is absolutely no evidence to demonstrate a history of withholding information or to otherwise establish that Alcoa may withhold information in the future just to be obstructive. Instead, as the testimony demonstrates, Alcoa had and continues to have serious concerns related to employee retaliation if the witness names are disclosed.

Respectfully submitted,

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	)	
Charging Party.	)	

CERTIFICATE OF SERVICE

I do hereby certify that on March 12, 2019, a true and correct copy of the foregoing Post-Hearing Brief was *Electronically Filed* on the NLRB's website http://www.nlrb.gov.

Also, I do hereby certify that a true and correct copy of the foregoing Post-Hearing Brief has been served by electronic mail this 12th day of March, 2019 on: Raifael Williams at Raifael.Williams@nlrb.gov and Marty Ellison at mellison@usw.org.

By: /s/ *Sarah M. Rain*
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